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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 449th MEETING

Held at the Vienna International Centre, Vienna,
on Monday, 17 June 1991, at 10 a.m.

Chairman: Mr. SONO (Japan)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 1 (continued)

1. The CHAIRMAN recalled that the Commission had decided that the problems that had arisen concerning the definition of a "bank" should be dealt with in the context of article 1 and had asked the representatives of Singapore, the United Kingdom and the United States of America and the observer for Finland to prepare an appropriate text. He drew attention to that text, which was to be found in conference room paper A/CN.9/XXIV/CRP.3.

2. Mr. VASSEUR (Banking Federation of the European Community) said that he had no objection to the draft text.

3. Mr. LE GUEN (France) said that, while he was satisfied with the text, he thought that it might more appropriately be placed as paragraph 2 of article 1, the existing paragraph 2 being renumbered as paragraph 3.

4. Mr. LIM (Singapore), speaking on behalf of the ad hoc drafting group, said that it had decided to add a separate paragraph in order to solve a problem raised by the representative of Mexico. If the provision were placed in paragraph 1 or paragraph 2, the reader might wonder if the application of the Model Law to banks in different States would also apply to an entity which was not a bank.

5. Speaking for his own delegation, he said he would have no objection to the provision being placed in paragraph 2.

6. Mr. GREGORY (United Kingdom) said that he had no strong feelings either way, but the Drafting Group had discussed the question and he would prefer that the provision be included as paragraph 3. Paragraphs 1 and 2 constituted a package on the sphere of application while the new paragraph 3 viewed the sphere of application from a different angle and should logically follow those two paragraphs.

7. Mr. SAFARIAN NEMATABADI (Islamic Republic of Iran) said he supported the French proposal. It was more logical to move from the general to the particular - first referring to "bank" and then defining banks, branches and so forth.

8. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission wished the proposed draft of article 1(3), as it appeared in conference room paper A/CN.9/XXIV/CRP.3, to be inserted as paragraph 2 of that article, the existing paragraph 2 being renumbered as paragraph 3.

9. It was so decided.

Article 2 (continued)

10. The CHAIRMAN recalled that the Commission had reached a substantive decision concerning parts of article 2 and had asked the representatives of Mexico and the United Kingdom and the observer for Finland to prepare an appropriate text. The resultant draft text was to be found in conference room paper A/CN.9/XXIV/CRP.2.

11. Mr. VASSEUR (Banking Federation of the European Community) inquired what had happened to the second sentence of article 2(f).

12. The CHAIRMAN said that the Commission had decided to delete the whole subparagraph in question.

13. Mr. VASSEUR (Banking Federation of the European Community) said that the second sentence of article 2(f), stating that the Law did not apply to an entity which merely transmitted payment orders, was a useful provision. In the interests of clarity, it ought to be retained somewhere.

14. The CHAIRMAN said that, while the Commission recognized that the second sentence of article 2(f) was important, some of its members had thought that the word "merely" might give rise to problems in connection with the use of SWIFT. It had therefore been agreed that the problem should be resolved by amending subparagraph (a) of article 2 (replacing "operations" in the first line by "payment orders" and the words "carry out" in the fourth line by "implement") and deleting subparagraph (f).

15. Mr. LE GUEN (France) said that he could not recall any discussion in the Commission on the addition of the last sentence to article 2(a) and would like an explanation from the ad hoc drafting group.

16. With respect to article 2 bis, he proposed that the words "and obligations" should be inserted after the word "rights" in the fourth line of paragraph 1.

17. Mr. ABASCAL ZAMORA (Mexico), speaking on behalf of the ad hoc drafting group, said that it had discussed the question whether a reimbursement payment order was part of the original credit and had decided, in the interests of clarity, that it should be a different credit transfer. A number of drafting proposals had been made during the discussions on modifying the definition of intermediary bank in article 2(h), and the group had also been asked to prepare an appropriate text. The result of the discussions was contained in the proposed third sentence under article 2(a).

18. As for article 2 bis, the French representative's comment regarding "rights and obligations" was applicable also in Spanish.

19. Mr. GREGORY (United Kingdom) said that the reference to "rights and obligations" should appear in the English version as well.

20. The CHAIRMAN suggested that the words "and obligations" should be inserted after the word "rights" in article 2 bis (1), in all language versions.

21. It was so decided.

22. Mr. LE GUEN (France) said he was satisfied with the explanation given by the representative of Mexico and withdrew his comment as far as the substance was concerned. He was not certain, however, that the sentence correctly interpreted the ad hoc drafting group's idea and suggested that the wording should be reviewed when the Model Law as a whole was being redrafted.

23. It was so decided.

Article 4 (continued)

24. The CHAIRMAN said that he had discussed with the representative of Japan a point that the latter had raised at an earlier meeting. He had explained to him that article 4(1) provided the basic rule and that all issues related to the question whether or not a payment order could be regarded as having been issued by the purported sender should be governed by the applicable law and fell outside the Model Law. Article 4(5) referred to "error" - which of course included alterations - and the first sentence of that paragraph made it clear that it was subject to the preceding paragraphs.

25. Mr. DE BOER (Netherlands) said it should be made clear that an alteration made during transmission by a third party was not covered by article 4(5).

26. The CHAIRMAN said that that had been the Japanese representative's point. Any discussion on the subject would be unproductive, however, since it would inevitably result in the conclusion that the question whether or not a particular person had authority as an agent to bind the purported sender was a matter for the applicable law, which might differ from country to country.

27. Mr. DE BOER (Netherlands) said that, if a third party changed a message during transmission, the matter should come under article 4(2) to (4) regarding unauthorized payment.

28. Ms. KOSKELO (Observer for Finland) said she understood that the concern of the representative of Japan had been to make it clear that unauthorized alterations of payment orders should come under paragraphs 2 to 4 of article 4 and not under paragraph 5, which dealt with errors made by the sender and transmission errors that were not fraudulent. It should be made clear that unauthorized alterations made during transmission would be covered by the preceding paragraphs of article 4.

29. The CHAIRMAN said he thought that the difficulty had been settled when the Commission had accepted the addition of the words "subject to preceding paragraphs".

(The Chairman)

30. He asked if the Commission wished to delete the square brackets around the words "execution date" in paragraph 6. That date would then be the one on which a receiving bank was required to execute a payment order.

31. Mr. SOLIMAN (Egypt) said that article 4(6) gave indications to both the parties. The receiving bank was required to execute the order and the sender was required to make the payment. The execution date was usually the date on which a bank accepted the payment order. He had no objection to the existing text.

32. Ms. KOSKELO (Observer for Finland) said that paragraph 6 gave rise to what had been termed a problem of circularity with respect to the relations between several provisions in the Model Law. It would be preferable if there were no reference to the payment or execution date in that paragraph and if it simply stated the obligation of the sender to honour the payment order, without any reference to when that should be done. Arrangements concerning the payment varied widely from one situation to another. Such arrangements, possibly bilateral or multilateral netting arrangements, were usually in existence already and payments were made accordingly.

33. Mr. GREGORY (United Kingdom) said that the question of the execution date was indeed part of a complex circular problem in the Model Law and it was difficult to consider paragraph 6 in isolation. As it stood, paragraph 6 indicated that payment was not due until the execution date but also that payment did not have to be made until the bank accepted the payment order. However, if the bank took no action, the rules on acceptance stated that acceptance did not take place until the payment was received.

34. In his view, article 4 concerning the obligations of the sender, articles 6 and 8 concerning acceptance, articles 7 and 9 concerning the obligations of the receiving bank and the beneficiary's bank, article 10 concerning the time of execution and article 16 concerning liabilities on failure to comply with obligations ought to be considered together.

35. For the time being, he proposed that the Commission confine itself to considering the suggestion by the observer for Finland.

36. Mr. BHALA (United States of America) said there could be no question at the current late stage of the Commission's restructuring its work along the lines proposed by the United Kingdom representative. The alleged problem of circularity arose only in the case of deemed acceptance under articles 6(2)(a) and 8(1)(a). The Commission itself had already approved the definition of the word "execute" and the Drafting Group had, perhaps, decided on the definition of "execution date" as well. It was not impossible that the problem of concern to the United Kingdom representative and the observer for Finland might be solved by appropriate drafting.

37. Mr. ABASCAL ZAMORA (Mexico) said that he was unable to accept the Finnish suggestion. He did not agree that there was a problem of circularity as

(Mr. Abascal Zamora, Mexico)

alleged by the representative of the United Kingdom. It would be dangerous if the Model Law contained no provision regarding the execution date, for national legislation would then be applicable and it was not always appropriate. In his own country, for example, the law stipulated that payment should be made 30 days after acceptance.

38. Mr. DE BOER (Netherlands) said that he, too, found it difficult to understand the problem of circularity that was worrying the representative of the United Kingdom.

39. Ms. KOSKELO (Observer for Finland) said that, in the case of payment orders, parties would normally have made advance arrangements regarding the manner in which payment was to be made, arrangements which would also cover the date of payment. Under the Model Law, the sender of a payment order had to pay for it to ensure its acceptance by the receiving bank, so that the structure of the Law gave the parties an incentive to make the necessary arrangements. Such arrangements might alter from situation to situation and it was unnecessary to go into details in the article in question.

40. The second part of the current text was related to the problem of circularity. It was not a question of making major structural changes to the Model Law, but of improving its techical drafting so that the Law could be understood and could function well in practice. For that reason, article 4(6) should begin with a rule concerning the obligation to pay.

41. The CHAIRMAN pointed out that, since the representative of Mexico had referred to situations in which no date was specified, the question was whether the applicable law should be invoked in such cases.

42. Ms. KOSKELO (Observer for Finland) said that, if the general rules of law provided that an obligation to pay would normally not arise early enough for the credit transfer to function, the parties would clearly need to come to some arrangement on the point. She did not think that any problem would arise in real life.

43. The CHAIRMAN said that the second part of article 4(6) was intended to cover the situation in which the parties did not agree on some arrangement.

44. Mr. CRAWFORD (Canada) said he was concerned at the procedure that was apparently being adopted, whereby a decision was to be taken by the Commission on a particular article while a matter of major concern was left unresolved.

45. The CHAIRMAN assured the representative of Canada that no question that seriously affected the utility and validity of the Model Law would be ignored.

46. If he heard no objection, he would take it that the Commission wished to adopt article 4(6), the square brackets being removed.

47. It was so decided.

Article 5

48. The CHAIRMAN said that sub-subparagraphs (b)(i), (ii) and (iii) would be taken together, while sub-subparagraph (b)(iv) would be treated separately. He reminded the Commission of the comments made by the Governments of Finland and Japan (A/CN.9/347, pp. 17-20 and p. 36) regarding the relevance of article 5. It was for the Commission to decide whether article 5 was relevant to all the situations in which the time of payment was important, or whether it was to be made clear that the article applied only within the Model Law.

49. Ms. KOSKELO (Observer for Finland) said that her delegation could not accept the idea that the introductory wording should begin with: "For the purposes of the Model Law". It was essential to make it clear that article 5 related solely to articles 6 and 8 of the Model Law.

50. Mr. DE BOER (Netherlands) said he agreed with the observer for Finland that article 5 should relate to certain articles only, and that the words "For the purposes of the Model Law" would not be enough to achieve that end.

51. Mr. LOJENDIO OSBORNE (Spain) and Mr. ERIKSSON (Observer for Sweden) supported the view that article 5 should relate solely to articles 6 and 8.

52. Mr. BHALA (United States of America) said that his delegation did not share the views of the observer for Finland. Article 5 was an integral part of the Model Law and it worked well. He suggested a three-step analysis: in step one, the question was asked when acceptance occurred, and the answer was supplied in articles 6 and 8; in step two, the question was asked what the sender's obligation was on acceptance, the answer being provided in article 4(6); in step three, the question was then asked when payment of the receiving bank by the sender had occurred, the answer being given in article 5. It was all clearly laid out in the Model Law.

53. The observer for Finland would limit step three to the case of "deemed acceptance", but he could see no reason to do so.

54. Mr. CRAWFORD (Canada) said he agreed with the United States representative that article 5 was useful in respect of the Model Law as a whole. If there were a conflict with general laws, it could be limited to the relationships governed by the Model Law but it should not be restricted to articles 6 and 8.

55. Mr. FUJISHITA (Japan) said he agreed that the application of article 5 should be restricted to articles 6 and 8. The Commission was not competent to consider general provisions on payment in all situations.

56. Mr. GREGORY (United Kingdom) said that, as he had understood the discussions in the Working Group, the purpose of article 5 was to mitigate the effects of "deemed acceptance". The existing wording was thus too broad. The analysis by the Government of Finland of the relationship between article 5 and article 17 (A/CN.9/347, p. 19, third paragraph) raised some legitimate concerns. He therefore supported the proposal that the effect of article 5 should be limited to articles 6 and 8, being unable to see why it was necessary to define the time of payment for other purposes.

57. Mr. BURMAN (United States of America) said that the troubling concept of "deemed acceptance" was complicating the issue. There was a danger not only of a loss of symmetry in the three steps his delegation had outlined but also of a distraction from the need to accommodate newly emerging banking techniques, without which the Model Law would be of limited application from the outset. The high-volume, high-speed computer-based systems, and the new systems of netting, were fundamentally different from the earlier systems used. New legal relationships would arise.

58. Mr. BHALA (United States of America) said, with regard to a comment by the representative of the United Kingdom, that article 17 related to an underlying obligation whereas article 5 dealt with the settlement between the sender and receiving bank.

59. As for the reason for defining the time of payment, the sender would wish to know when the liability arising from acceptance by the receiving bank was discharged. Similarly, the receiving bank wished to know when a receivable was received. In both cases, that question was answered in article 5. It was useful, in the interests of harmonization, for both the sender and the receiving bank to know when the obligation to pay occurred.

60. The CHAIRMAN asked whether the United States delegation wished article 5 to apply to all situations in which the obligation to pay was discharged, including insolvency.

61. Mr. BHALA (United States of America) said that his delegation thought that article 5 should apply to the Model Law only and not to insolvency. It simply did not wish to see any further limitation on the scope of article 5.

62. Mr. ABASCAL ZAMORA (Mexico) drew attention to the report of the Working Group (A/CN.9/344, para. 59) which clearly indicated that the time when the obligation to pay occurred was not restricted to "deemed acceptance".

63. Ms. KOSKELO (Observer for Finland) said that article 5 failed to recognize netting systems, referring them back to the applicable law. That might be regrettable but the Working Group had, in fact, failed to achieve such recognition and article 5 was thus capable of relevance to "deemed acceptance" only.

64. She could not agree that article 5 was not relevant to article 17, since article 5(b)(ii) covered reimbursement by a sending bank of a receiving bank through an account in a third bank. Such a reimbursement would be a separate credit transfer and thus might be covered by the Model Law. However, those two provisions provided a different answer to the question when payment occurred: in article 17, it was the time when the third bank accepted the payment order; in article 5(b)(ii) it could be a different time.

65. The United States representative had explained that the sender and receiving bank must know the time when the obligation to pay occurred. While that was true, article 5 was not germane to the matter. The question was most likely to arise in the event of insolvency, which would be covered by the applicable law.

(Ms. Koskelo, Observer for Finland)

66. The possibility envisaged in article 5 that the obligation to pay might occur on the day following the day on which the credit was available for use was clearly contrary to the general principles of law. It would be difficult, therefore, to adopt article 5 unless it was confined to "deemed acceptance".

67. The CHAIRMAN said it was not clear whether there was a general feeling among the members of the Commission that some form of qualifying phrase was needed in article 5. He suggested, therefore, that further discussion of article 5(b)(i), (ii) and (iii) should be suspended until sub-subparagraph (iv) on the topic of netting had been discussed. A trend might then emerge which would lead to an overall compromise acceptable to all.

The meeting rose at 12.35 p.m.